STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal From Oakland County Circuit Court
Judge Gene Schnelz

MEE SOOK RADZINSKI a/k/a
SUE RADZINSKI,

Plaintiff-Appellant,

-vs-

JOHN DOE/JANE ROE as Personal Representative of JENNIFER CARLSON, a Minor, NANCY LEE CARLSON and ERIC STEVEN CARLSON, Jointly and Severally,

Defendants-Appellees.

Michigan Supreme Court
Case No. 122522

Court of Appeals
Case No. 233998

Lower Court
Case No. 00-025663-CZ

BRIEF ON APPEAL - APPELLEES

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

The jurisdictional summary stated in the Plaintiff-Appellant's brief is complete and correct.

STANDARD OF REVIEW

The trial court's decision to grant a Motion for Summary Disposition is reviewed de novo. Spiek v Dep't of Transportation, 456 Mich 331, 336; 572 NW2d 201 (1998).

COUNTER-STATEMENT OF QUESTION PRESENTED

I. **DID THE CIRCUIT COURT ERR IN GRANTING DEFENDANTS-APPELLEES' MOTION FOR SUMMARY DISPOSITION UNDER MICHIGAN COURT RULE 2.116(C)(10) AND DID THE COURT OF APPEALS ERR IN AFFIRMING THE CIRCUIT COURT'S RULING?**

The Circuit Court answered "No."

The Court of Appeals answered "No."

The Appellees answer "No."

The Appellant answers "Yes."

COUNTER-STATEMENT OF FACTS

In September of 1998, Nancy Carlson brought her daughter, Jennifer Carlson, to the place of employment where she and her husband, Eric Carlson, worked, Eagle Ottawa Leather in Rochester Hills. (People of the State of Michigan v Mee Sook Radzinski, Case No. 99-003820-FY, Preliminary Examination ["P.E."], July 1, 1999, Vol. I, p. 8.) Ms. Carlson and her daughter came to visit Eric Carlson on a Saturday morning at Eagle Ottawa in order to pick up a credit card or checkbook from Mr. Carlson so that Ms. Carlson and her daughter could go shopping. (July 1, 1999, P.E., Vol. I, p. 10.)

While at Eagle Ottawa Leather, Mee Sook Radzinski (a/k/a Sue) met Ms. Carlson and her daughter and brought them over to her desk. (July 1, 1999, P.E., Vol. I, p. 13.) Jennifer Carlson, age 14 at the time, presented Ms. Radzinski with a copy of her 9th grade school portrait. Ms. Radzinski then pulled Jennifer Carlson down forcing her to sit on Ms. Radzinski's lap. (July 1, 1999, P.E., Vol. I, p. 16.) Ms. Radzinski then began to fondle Jennifer Carlson's breasts stating that they were very large and that she wished that hers were as large. (July 1, 1999, P.E., Vol. I, pp. 17-18.) Jennifer Carlson immediately tried to get up and get away from Ms. Radzinski, however, Ms. Radzinski held her down and continued to fondle Jennifer Carlson and to make inappropriate sexual comments. (July 1, 1999, P.E., Vol. I, pp. 17-18.) The incident ended moments later when Ms. Radzinski's husband, Isaac Radzinski, also an employee at Eagle Ottawa walked into the office area. (July 1, 1999, P.E., Vol. I, p. 20.)

Nancy Carlson discussed the incident with her husband, Eric Carlson. However, because of their employment by Eagle Ottawa and the fact that Ms. Radzinski was the wife of the Vice-President of the company, Isaac Radzinski, they decided not to report the incident. (July 1, 1999, P.E., Vol. I, p. 213 and People of the State of Michigan v Mee Sook Radzinski, Case No. 99-003820-FY, Preliminary Examination, July 15, 1999, Vol. II, p. 17.) In addition, Isaac Radzinski served as a supervisor of Eric Carlson and as a mentor.

A second incident occurred several weeks later once again involving Ms. Radzinski and inappropriate sexual contact with another employee. On this second occasion, Ms. Radzinski, Defendants Jacklyn Vanderzwaag, Debbie Hershaft (now Wehrmeyer) and Nancy Carlson were in a lunch room/break room. Ms. Radzinski was sitting at a table by herself when she began to stroke her leg and thighs while make moaning noises. Ms. Hershaft was preparing a cup of coffee at the time. Ms. Radzinski then got up, came over to Ms. Hershaft, and began to "hump" her from behind. Ms. Hershaft immediately attempted to separate herself from Ms. Radzinski. (People of the State of Michigan v Mee Sook Radzinski, Case No. 99-003819-FY, Preliminary Examination, November 9, 1999, Vol. I, pp. 38-44.)

Several months passed during which Defendants Jacklyn Vanderzwaag, Nancy Carlson and Debbie Hershaft were all laid off from their employment based upon corporate restructuring. Eventually, Sue Radzinski and Isaac Radzinski also left employment with Eagle Ottawa.

Nancy Carlson continued to be haunted by the sexual assault of her daughter and her feelings that she did not respond appropriately to the actions of Ms. Radzinski at the time. On March 3, 1999, Nancy Carlson was seen for a comprehensive assessment at the Oakland Psychological Clinic. At that time, she reported the incident involving her daughter, Jennifer Carlson, and Sue Radzinski as a source of anxiety, depression, feelings of guilt and other psychological problems. Ms. Carlson's psychological therapist/social worker, Elizabeth Paul, immediately stated to Nancy Carlson that she was under an obligation by state law to report the actual or suspected child abuse to the Michigan Department of Social Services. (July 15, 1999, P.E., Vol. II, pp. 15-16.) Nancy Carlson pleaded with Ms. Paul in an attempt to get her not to report the incident for fear of the repercussions to her husband's employment at Eagle Ottawa.

Notwithstanding Nancy Carlson's protests, Elizabeth Paul called the Michigan Department of Social Services with an oral report of the actual or suspected child abuse on March 3, 1999. The following day, on March 4, 1999, Ms. Paul filed a written report of the incident to the Michigan Department of Social Services. (Exhibit A of the Defendants-Appellees' Motion for Summary Disposition.)

The oral and written reports of the sexual assault of Jennifer Carlson were forwarded to the Department of Social Services (now Family Independence Agency) by Elizabeth Paul. The matter was then referred to Richard Ribant of the Oakland County Family Independence Agency. The agency found no parental neglect on the part of the Carlsons and then referred the Carlsons to the Oakland

County Sheriff's Department to report the sexual assault by Sue Radzinski. **Based upon the statements of Elizabeth Paul and Richard Ribant, the Carlsons followed express instructions to report the incident to the Sheriff's Department.**

On March 9, 1999, Nancy Carlson, Eric Carlson and Jennifer Carlson reported the incident to the Oakland County Sheriff's Department. (Exhibit B of Defendants-Appellees' Motion for Summary Disposition.) The matter was referred to the Oakland County Sheriff's Department Detective Travis Dick who undertook an independent investigation of the matter.

Detective Dick interviewed the Carlsons. Next, his independent investigation consisted of contacting and interviewing Defendant Jacklyn Vanderzwaag, Defendant Debbie Hershaft (now Wehrmeyer), Chris Dodge (Human Resources Director at Eagle Ottawa Company), Isaac Radzinski (Vice-President of the company and husband of the Appellant), Jerry Sumptor (CEO of Eagle Ottawa Company), Attorneys Tom Clasen and Kathy Bahn of Eagle Ottawa Company, Family Independence Agency Investigator Richard Ribant, Eric Quinn (Safety Manager at the Eagle Ottawa Company plan), Jason Chon (employee of Eagle Ottawa Company), and Attorney Wally Piszczatowski who represented the Appellant. Detective Dick also traveled to Muskegon to meet with Debbie Hershaft with regard to the criminal sexual assault by Ms. Radzinski upon herself.

Detective Dick attempted to speak with Ms. Radzinski but was told that she had an attorney who would arrange for a meeting. The meeting never occurred. At the completion of Detective Dick's investigation, he presented a 47

page report[1] which he presented as a part of the warrant package to the Oakland County Prosecutor's office on April 29, 1999. The Prosecutor's office issued warrants on May 3, 1999, against Sue Radzinski based upon criminal sexual conduct in the fourth degree with regard to the incidents involving Jennifer Carlson and Debbie Hershaft. (Exhibit D of Defendants-Appellees' Motion for Summary Disposition.)

Sue Radzinski was arraigned and two preliminary examinations were held with regard to the two counts of criminal sexual conduct. The Carlsons and Debbie Hershaft testified in accordance with subpoenas issued by the prosecutor requiring their presence at the hearings. On October 12, 1999, Judge Ralph H. Nelson of the 52-3 District Court bound Case No. CR-99-169406-FH, The People of the State of Michigan v Mee Sook Radzinski (criminal sexual conduct - fourth degree with regard to Jennifer Carlson), over to the Oakland County Circuit Court. On December 14, 1999, Judge Nelson also bound over Case No. CR-99-169780-FH, The People of the State of Michigan v Mee Sook Radzinski (criminal sexual conduct - fourth degree with regard to Debbie Hershaft), to the Oakland County Circuit Court.

The trial of the matter against Sue Radzinski with regard to criminal sexual conduct against Jennifer Carlson occurred from July 18 through July 24, 2000. The jury trial concluded with a verdict of not guilty in favor of Defendant, Sue Radzinski. Soon thereafter, counsel for Ms. Radzinski and the Oakland

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[1]Please refer to Appellees' Appendix, pp 2b-48b.

County prosecutor's office entered into a plea agreement with regard to the case against Ms. Radzinski involving Debbie Hershaft. Ms. Radzinski entered a plea of nolo contendere (no contest) to the charge of disorderly person. (Exhibit C of Defendants-Appellees' Motion for Summary Disposition.)

The Plaintiff-Appellant filed her Complaint in the Oakland County Circuit Court on or about August 28, 2000. On April 4, 2001, the Circuit Court granted the Defendants-Appellees' Motion for Summary Disposition and dismissed with prejudice all claims of the Plaintiff-Appellant against the Defendants-Appellees.

Following the dismissal of the action, the Plaintiff-Appellant filed an Appeal of Right in the Michigan Court of Appeals. Briefs were filed by counsel for the Appellant and the Appellees and oral argument was presented to the Court of Appeals on September 10, 2002. On September 20, 2002, the Court of Appeals affirmed the trial court's Order Granting Summary Disposition in favor of Defendants pursuant to MCR 2.116(C)(10) by way of an unpublished Opinion. This Court granted Appellant's Application for Leave to Appeal on July 3, 2003.

ARGUMENT

The trial court did not err in granting the Defendants-Appellees' Motion for Summary Disposition under MCR 2.116(C)(10) and the Court of Appeals did not err in affirming the trial court's ruling.

I. THERE IS NO GENUINE ISSUE OF MATERIAL FACT CONCERNING THE CLAIM OF MALICIOUS PROSECUTION.

In an action for malicious prosecution, the plaintiff has the burden of proving (1) that the defendant has initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his action, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. Matthews v Blue Cross and Blue Shield of Michigan, 456 Mich 365, 378 (1998).

A. The Defendants-Appellees Did Not Initiate The Criminal Prosecution Against The Plaintiff, Sue Radzinski.

In Michigan, prosecution is initiated in the sole discretion of the prosecutor. Matthews, at 367. In this case, the prosecution was initiated by the actions of Elizabeth Paul, the psychologist/social worker from the Oakland County Psychological Clinic who referred the matter to the Family Independence Agency. In addition, Richard Ribant of the Family Independence Agency referred the matter to the Oakland County Sheriff's Department.

The Oakland County Sheriff's Department undertook an independent investigation by Detective Travis Dick who referred the matter to the Oakland

County prosecutor's office. In a recent unreported decision of the Court of Appeals, the Court held, "Despite the fact that the warrant may not have been issued without the information provided by Defendants, the prosecution was initiated based on an independent exercise of prosecutorial discretion." Laney v Blue Cross Blue Shield of Michigan, 2003 WL 1343284 (Mich App) citing Matthews v Blue Cross Blue Shield of Michigan, 456 Mich 365, 386; 572 NW2d 603 (1998).[2] The Oakland County prosecutor's office authorized the issuance of warrants for two counts of criminal sexual conduct in the fourth degree against Sue Radzinski. The independent exercise of prosecutorial discretion establishes that the private defendant did not initiate the prosecution. Matthews at 386. In addition, **the prosecutor's exercise of his independent discretion in initiating and maintaining a prosecution is a complete defense to an action for malicious prosecution.** Matthews at 383.

B. Probable Cause Was Established.

In Matthews, criminal charges were initiated against Dr. Matthews by the Oakland County Prosecutor following an investigation by the State Police on the basis of information submitted by Dennis Drake, a Blue Cross and Blue Shield financial investigator. Matthews at 371. An independent investigation conducted by the State Police supported probable cause to believe that a crime had been committed. Matthews at 368. In this case, an independent investigation was

[2]See Exhibit 1.

conducted by the Oakland County Sheriff's Department and spearheaded by Detective Travis Dick. Detective Dick testified as follows at his deposition:

Question: When you go through the various steps of an investigation, who decides who to interview next, what reports to generate, that kind of thing? Is that left up to you or someone else in the Department?

Answer: Initially, I'm the detective assigned to it, so it would be me.

Question: Alright. And in this case, once the matter was assigned to you, were there any other investigators or detectives working on this?

Answer: No. There was not.

Question: You put together the entire investigation and presented it to the prosecutor's office; is that correct?

Answer: That's correct.

(Travis Dick deposition, p 20.)

Question: Once you present the warrant package to the prosecutor's office, do they always decide to go forward with the prosecution of the case?

Answer: No.

Question: What do they do if they don't?

Answer: Again, these -- these matters are presented to the prosecutor's office for review and request for action. However, again, ultimately, it's their decision. If they decide that there is no clear violation of criminal law, they'll either further it on for further investigation, or they will deny the warrant request.

Question: Okay. What did they do in this case?

Answer: They granted the request and issued two warrants, two complaint warrants for criminal sexual conduct, the fourth degree.

(Travis Dick deposition, pp 25-26.) Thus, the independent investigation conducted by the Oakland County Sheriff's Department supported probable cause to believe that a crime had been committed.

A plaintiff's prima facie case against a private person requires proof that the private person instituted or maintained the prosecution and that the prosecutor acted on the basis of information submitted by the private person that did not constitute probable cause. Matthews at 379. In Matthews, the Court stated that "the information developed by Officer Waldron was submitted to the prosecutor who authorized issuance of a warrant on grounds **that established probable cause** to believe that Dr. Matthews had committed a felony." Matthews at 386. In the Radzinski matter, the information developed by Detective Dick was submitted to the prosecutor who authorized the issuance of the warrants on grounds that also established probable cause to believe that the Plaintiff-Appellant had committed a crime.

"To constitute probable cause . . . there must be such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man to believe that the person arrested is guilty of the offense charged." Matthews at 387. In addition, the Matthews court found that the information contained within the report to the State Police was information that

would cause a reasonable mind to believe in the guilt of the accused. Matthews at 388. The same holds true for the information contained within the investigation report of Detective Dick which was forwarded to the Oakland County prosecutor's office.

The element of probable cause refers to whether the Defendant had probable cause to believe that the Plaintiff had committed a crime. Laney, citing Matthews v Blue Cross Blue Shield of Michigan, 456 Mich 365, 379; 572 NW2d 603 (1998). However, probable cause does not depend on actual guilt and there may be probable cause to believe a person is guilty of a crime when he was actually innocent. Thus, the fact that the criminal proceedings were ultimately terminated in the Plaintiff's favor does not mean that probable cause for initiating the proceedings was lacking. Laney, citing Drobczyk v Great Lakes Steel Corp, 367 Mich 318, 322-322; 160 NW2d 736 (1962). The Laney Court also held, "There was no evidence introduced establishing that defendants initiated or maintained the prosecution, or that the prosecutor acted solely on the basis of information supplied by defendants." The same holds true for this case.

The Court of Appeals in this case stated, "In Michigan, the prosecutor's exercise of his independent discretion in initiating and maintaining the prosecution is a complete defense to an action for malicious prosecution." Matthews, supra, at 384. "In the instant case, there is no evidence that the prosecution was initiated other than at the sole discretion of the prosecutor, based on an independent investigation. Plaintiff failed to present any evidence of inducement or pressure or an infringement on the prosecuting attorney's authority

in bringing or continuing the prosecution." (Radzinski v John Doe/Jane Doe, et al, p 2 of unpublished Opinion dated September 20, 2002.) Such analysis is in line with established case law and should not be disturbed.

C. The Allegation Of Malicious Prosecution Fails Because Appellant Cannot Establish That The Action Was Undertaken With Malice.

Malice may be inferred from a lack of probable cause. Flones v Dalman, 199 Mich App 396, 405; 502 NW2d 725 (1993). Thus, if probable cause is established, then malice cannot be inferred. As stated in the previous section, probable cause was established in this case. Because of this, malice may not be inferred.

II. THERE IS NO GENUINE ISSUE OF MATERIAL FACT CONCERNING THE CLAIM OF ABUSE OF PROCESS.

"To recover upon a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding." Bonner v Chicago Title Ins Co, 194 Mich App 462, 472 (1992) citing Friedman v Dozorc, 412 Mich 1, 30 (1981).

> A meritorious claim of abuse of process contemplates a situation where the defendant has availed himself of a proper legal procedure for a purpose collateral to the intended use of that procedure, e.g., where the defendant utilizes discovery in a manner consistent with the rules of procedure, but for the improper purpose of imposing an added burden and expense on the opposing party in an effort to conclude the litigation on favorable terms.

> Furthermore, the improper ulterior purpose must be demonstrated by a corroborating act; the mere harboring of bad motives on the part of the actor without any manifestation of those motives will not suffice to establish an abuse of process. Vallance v Brewbaker, 161 Mich App 642, 646 (1987) citing Young v Motor City Apartments, 133 Mich App 671, 678-683 (1984).

The Plaintiff has failed to allege a corroborating act. In her complaint, the Plaintiff alleges that the Defendants ". . . provided false and inaccurate statements and allegations to Officer Travis Dick of the Oakland County Sheriff's Department. Defendants knew or should have known that the information contained in their police reports and statements was false." (Complaint, ¶41.) The Plaintiff has alleged that the ulterior motive of the Defendants was to cause vexation, trouble, embarrassment and damage to Sue Radzinski's professional and community reputations. (Complaint, ¶40.) However, no act supporting such alleged ulterior purposes has been demonstrated. Just as in the cases cited above, allegations of harboring of bad motives on the part of the Defendants without any manifestations of those motives will not suffice to establish an abuse of process.

The Plaintiff also alleged in her response brief that the corroborating act was Nancy Carlson's act of signing a Contingency Fee Agreement with an attorney on March 13, 1999, regarding "injuries suffered by him/her on October 26, 1999." (Plaintiff's Brief in Opposition to Defendants' Motion for Summary Disposition, p 10.) The Contingency Fee Agreement makes no mention of the specific cause of action. In addition, no cause of action has ever been filed. Finally, even if the date in the Contingency Fee Agreement refers to the last day of

employment at Eagle Ottawa by Nancy Carlson, the termination and severance agreement with Eagle Ottawa prevents any cause of action being filed against it as one of the terms of the settlement.

The Court of Appeals in relying upon Bonner v Chicago Title Ins Co, 194 Mich App 462; 487 NW2d 807 (1992), stated, "However, no corroborating act supporting such alleged ulterior purpose has been demonstrated and, as the trial court noted, the documentary evidence submitted by Plaintiff attempting to link defendant Nancy Carlson's loss of employment with the present matter, in the form of e-mails and a contingency fee agreement, does not mention Plaintiff 'in any way, shape or form.' Plaintiff's conclusory allegations are insufficient to withstand summary disposition under MCR 2.116(C)(10)." (Radzinski v John Doe/Jane Doe, et al, p 3 of unpublished Opinion dated September 20, 2002.) Such analysis is in line with established case law and should not be disturbed.

III. THERE IS NO GENUINE ISSUE OF MATERIAL FACT CONCERNING THE CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Whether the facts alleged by the Plaintiff are sufficient to constitute a tort of intentional infliction of emotional distress is a question of law for the Court. Graham v Ford, 237 Mich App 670, 674 (1999).

> In order to invoke the tort of intentional infliction of emotional distress, and thus come within the intentional-tort exception, plaintiffs had to establish (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. Graham, at 674 citing Haverbush v Powelson, 217 Mich App 228 (1996). Liability for the intentional infliction of emotional distress has been found only where the conduct

> complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Doe v Mills, 212 Mich App 73, 91, 536 NW2d 824 (1995). Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Id. It is not enough that the defendant has acted with an intent that is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort. Roberts v Auto-Owners Ins Co, 422 Mich 594, 602-603, 374 NW2d 905 (1985), quoting Restatement Torts, 2d §46, comment d, pp. 72-73. In reviewing a claim of intentional infliction of emotional distress, we must determine whether the defendant's conduct is sufficiently unreasonable as to be regarded as extreme and outrageous. Doe, supra at 92, 536 NW2d 824. The test is whether "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" Roberts, supra, at 603, 374 NW2d 905.

Graham, at 674-675.

The Defendants' actions of reporting instances of criminal sexual conduct at the direction of a treating psychologist/social worker, the Family Independence Agency, the Oakland County Sheriff's Department and the Oakland County prosecutor's office do not meet the standards stated above.

The Plaintiff has presented no legal authority within the state of Michigan to support a claim of intentional infliction of emotional distress based upon the reporting of a sexual assault against one's daughter. In addition, the Plaintiff has failed to present this Court with evidence of extreme and outrageous

conduct, intent or recklessness, causation and severe emotional distress experienced by the Plaintiff.

The Court of Appeals in this case stated, "Defendants' actions of reporting alleged instances of criminal sexual conduct at the direction of a treating psychologist/social worker, the Family Independence Agency, the sheriff's department and the prosecutor's office do not meet the standards set forth above, and Plaintiff has otherwise failed to present any evidence of extreme and outrageous conduct sufficient to sustain her claim. (Radzinski v John Doe/Jane Doe, et al, p 3 of unpublished Opinion dated September 20, 2002.) Such analysis is in line with established case law and should not be disturbed.

IV. THE PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION AGAINST THESE DEFENDANTS FOR CONSPIRACY TO MALICIOUSLY PROSECUTE BECAUSE THE ALLEGED CAUSE OF ACTION IS NOT VIABLE UNDER THE MALICIOUS PROSECUTION STATUTE, MCL 600.2907.

MCL 600.2907 states the following:

> Every person who shall, for vexation and trouble or maliciously, cause or procure any other to be arrested, attached, or in any way proceeded against, by any process or civil or criminal action, or in any other manner prescribed by law, to answer to the suit or prosecution of any person, without the consent of such person, or where there is no such person known, shall be liable to the person so arrested, attached or proceeded against, in treble the amount of the damages and expenses which, by any verdict, shall be found to have been sustained and incurred by him; and shall be liable to the person in whose name such arrest or proceeding was had in the sum of $200.00 damages, and shall be deemed guilty of a misdemeanor, punishable on conviction by imprisonment in the county jail for a term not exceeding 6 months.

> Generally, when a statute creates a new right or imposes a new duty, the remedy provided by the statute to enforce the right, or for nonperformance of the duty, is exclusive. Where the common law provides no right to relief, but the right to relief is created by statute, a plaintiff has no private cause of action to enforce the right unless (1) the statute expressly creates a private cause of action, or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions. Lane v KinderCare Learning Centers, Inc., 231 Mich App 689, 695-696 (1998) citing Pompey v General Motors Corp, 385 Mich 537, 552 (1971) and Long v Chelsea Community Hospital, 219 Mich App 578, 583 (1996).

The primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature. Farrington v Total Petroleum, Inc., 442 Mich 201, 212 (1993). The first criterion in determining intent is the specific language of the statute. House Speaker v State Administrative Board, 441 Mich 547, 567 (1993). The Legislature is presumed to have intended the meaning it plainly expressed. McFarlane v McFarlane, 223 Mich App 119, 123 (1997). Judicial construction of a statute is not permitted where the plain and ordinary meaning of the language is clear. Dep't of Treasury v Comerica Bank, 201 Mich App 318, 322 (1993).

The Plaintiff's claim of conspiracy to maliciously prosecute fails as a matter of law because no such cause of action is contained within this statute. See Lane, supra, where the court held that where the Act adequately provides for enforcement of its provisions, a new private cause of action cannot be created. MCL 600.2907 provides for civil actions with appropriate relief including damages based upon violations of the statute. Because there is an adequate remedy, the

Plaintiff is not entitled to create her own cause of action based upon an allegation of a conspiracy not covered by MCL 600.2907.

The Court of Appeals concluded that the Plaintiff's conspiracy to commit malicious prosecution claim fails in light of its conclusion that the trial court did not err in granting summary disposition on Plaintiff's malicious prosecution claim. (Radzinski v John Doe/Jane Doe, et al, p 2 of unpublished Opinion dated September 20, 2002.) The Court of Appeals cited Roche v Blair, 305 Mich 608, 613-614; 9 NW2d 861 (1943) and Earp v Detroit, 16 Mich App 271, 275; 167 NW2d 841 (1969) in support of its conclusion. Such analysis is in line with established case law and should not be disturbed.

V. THE PLAINTIFF HAS FAILED TO ALLEGE A VIABLE CAUSE OF ACTION AGAINST THESE DEFENDANTS FOR CONSPIRACY TO INFLICT EMOTIONAL DISTRESS.

The Plaintiff alleged that "Defendants Jennifer Carlson, Nancy Carlson, Eric Carlson, Debbie Hershaft, Jacklyn Vanderzwaag and Hyun Cho to conspire (sic) and agreed with each other to inflict emotional distress upon Plaintiffs Sue Radzinski and Isaac Radzinski." (Complaint, ¶48.) The Plaintiffs have failed to allege any acts in support of such conspiracy theory. In Sankar v Detroit Bd of Ed, 160 Mich App 470 (1987), the Court of Appeals reversed the trial court with regard to its failure to dismiss conspiracy charges against the defendants. In Sankar, a former teacher brought an action against the school board after she was given an unsatisfactory job performance evaluation. The Court stated, "The facts do not show, either directly or circumstantially, that there was any agreement between defendants to have plaintiff transferred or demoted.

Therefore, the trial court should have dismissed the civil conspiracy charge against defendants." Sankar, at 482. Just as in Sankar, the Plaintiffs have failed to allege any actions showing an agreement between these Defendants to inflict emotional distress upon Sue Radzinski.

The Court of Appeals in this case concluded that the conspiracy claim related to the claim of intentional infliction of emotional distress was properly dismissed by the trial court pursuant to Earp, supra. Such analysis is in line with established case law and should not be disturbed.

VI. THE PLAINTIFF-APPELLANT DID NOT CONTEST THE DISMISSAL BY THE CIRCUIT COURT OF THE COUNTS BASED UPON CONSPIRACY TO MALICIOUSLY PROSECUTE AND CONSPIRACY TO INFLICT EMOTIONAL DISTRESS.

The Circuit Court stated the following at the summary disposition hearing with regard to the two counts based upon conspiracy:

> On the conspiracy to maliciously prosecute, defendants argue that they are entitled to summary disposition on the conspiracy to maliciously prosecute because there is no such cause of action. Plaintiff does not contest this argument. And it would seem I would have to grant that.

(Motion for Summary Disposition hearing transcript, p 7.) The Court also went on to state:

> Now, defendants argue that they are entitled to summary disposition on the count, alleging conspiracy to inflict emotional distress because the plaintiff has not pled any acts taken by the defendants to support a conspiracy theory. Again, the plaintiffs do not contest this argument. I am satisfied from defendant's argument and will grant that one.

The Plaintiff-Appellant should not be allowed to raise the issue regarding the conspiracy counts for the first time with the Court of Appeals. If an issue was not raised or briefed by a party to the appeal, then it has not been properly preserved for appellate review. Attorney General v Public Service Comm'n, 243 Mich App 487, 494 (2000), citing Meagher v McNeely and Lincoln, Inc., 212 Mich App 154, 156 (1995).

RELIEF

WHEREFORE, the Defendants-Appellees request that this Court affirm the decision of the trial court and the Court of Appeals with regard to the granting of the Defendants' Motion for Summary Disposition.

Respectfully submitted,

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Defendants-Appellees, John Doe/Jane Roe as P.R. of Jennifer Carlson, a minor, Nancy Lee Carlson and Eric Steven Carlson

Dated: 9/29/03

By: John P. Nicolucci
John P. Nicolucci (P49237)

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Not Reported in N.W.2d
(Cite as: 2003 WL 1343284 (Mich.App.))

Court of Appeals of Michigan.

Dr. Lee C. LANEY, Jr., and Kim Laney,
Plaintiffs-Appellants,
v.
BLUE CROSS BLUE SHIELD OF MICHIGAN
and Douglas Cedras, Defendants-Appellees.

No. 236977.

March 11, 2003.

Before: METER, P.J., and JANSEN and TALBOT , JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition and dismissing plaintiffs' complaint. We affirm.

Plaintiffs' first issue on appeal is that plaintiff Dr. Lee Laney's arrest and custody constituted false arrest/false imprisonment [FN1] or, at least, a question of fact exists on the claim. We disagree.

> FN1. "False arrest and false imprisonment are often used interchangeably, Prosser, Torts (4th ed), § 11, p 42, although there is technically a difference between the two actions.... 'False arrest and false imprisonment as causes of action are said to be distinguishable only in terminology. The difference between them lies in the manner in which they arise. It is not necessary, to commit false imprisonment, either to intend to make an arrest or actually to make an arrest. However, a person who is falsely arrested is at the same time falsely imprisoned, and an unlawful arrest may give rise to a cause of action for either false arrest or false imprisonment. Thus, it has been stated that false arrest and false imprisonment are not separate torts, and that a false arrest is one way to commit false imprisonment; since an arrest involves a restraint, it always involves imprisonment." ' *Lewis v. Farmer Jack, Inc,* 415 Mich. 212, 218; 327 NW2d 893 (1982) (Williams, J., dissent), quoting 32 Am Jur 2d, False Imprisonment, § 2, pp 59-60, citing 35 CJS, False Imprisonment, § 2, p 624.

A trial court's determination of a motion for summary disposition is reviewed de novo on appeal. *Peters v. Dep't of Corrections,* 215 Mich.App 485, 486; 546 NW2d 668 (1996). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Quinto v. Cross & Peters Co,* 451 Mich. 358, 362; 547 NW2d 314 (1996). This Court may grant a motion for summary disposition pursuant to MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Scott v. Harper Recreation,* 444 Mich. 441, 448; 506 NW2d 857 (1993); *Krass v. Tri-County Security, Inc,* 233 Mich.App 661, 684 n 14; 593 NW2d 578 (1999).

False imprisonment has been defined by this court as an unlawful restraint on a person's liberty or freedom of movement. *Clark v. K-Mart Corp,* 197 Mich.App 541, 546; 495 NW2d 820 (1992). A false arrest is an illegal or unjustified arrest, and the guilt or innocence of the person arrested is irrelevant. *Lewis v. Farmer Jack, Inc,* 415 Mich. 212, 218; 327 NW2d 893 (1982). To prevail on a claim of false arrest or false imprisonment, a plaintiff must show that the arrest was not legal, i.e., the arrest was not based on probable cause. *Lewis, supra,* 415 Mich. 218; *Burns v. Olde Discount Corp,* 212 Mich.App 576, 581; 538 NW2d 686 (1995); *Tope v. Howe,* 179 Mich.App 91, 105; 445 NW2d 452 (1989). Whether the plaintiff could actually have been convicted is irrelevant because actual innocence is

not an element of false arrest. *Lewis, supra,* 415 Mich. 218 n 1; *Brewer v. Perrin,* 132 Mich.App 520, 527; 349 NW2d 198 (1984). The Court, in *Lewis* explained the general rule and its limitations:

> [I]t must be a false arrest, *made without legal authority.* One who instigates or participates in a lawful arrest, as for example an arrest made under a properly issued warrant by an officer charged with the duty of enforcing it, may become liable for malicious prosecution, as stated in Chapter 29, or for abuse of process, as stated in Chapter 31, but he is not liable for false imprisonment, since no false imprisonment has occurred." [*Lewis, supra,* 415 Mich. 218 n 2, quoting 1 Restatement Torts, 2d, § 45A, p 69, Comment b.]

There is no dispute that plaintiff Dr. Laney, after turning himself in, was arrested and held by the Warren Police Department. Plaintiffs argue on appeal that defendants knowingly, intentionally, and without probable cause, instigated the City of Warren Police Department and compelled plaintiff Dr. Laney to be arrested. Where the facts are undisputed, the determination whether probable cause exists is a question of law for the court to decide. *Matthews v Blue Cross Blue Shield of Michigan,* 456 Mich. 365, 381-382; 572 NW2d 603 (1998); *Hall v. Pizza Hut of America, Inc,* 153 Mich.App 609, 615; 396 NW2d 809 (1986). In this case, the facts regarding the circumstances leading to the arrest were virtually undisputed. Investigator Cheryl Dawson, while working undercover investigating an alleged fraud scheme by Paul Smith and Gregory Smith, received information and a referral from Paul Smith that implicated plaintiff Dr. Laney. A bill was submitted to defendant Blue Cross, and plaintiff Dr. Laney received payment for an abdominal echogram that was not rendered. Plaintiffs argue that a question of fact exists because there was very little information from Investigator Dawson's investigation, because Macomb County Prosecutor Eric Kaiser does not recall whether he was informed that a third party biller was involved, because Constance Bruni testified that she did not think plaintiff Dr. Laney would intentionally submit a false claim, and because Diane Bradford testified that, in twenty years, plaintiff Dr. Laney has never been in any trouble with the authorities. The only possible disputed fact surrounding the finding of probable cause would be whether Prosecutor Kaiser was informed that a third party biller submitted the claim. However, Prosecutor Kaiser testified that he did not know if he was told that a third party biller was used, and that it was not "crucial" to his determination. Furthermore, a false claim can still be submitted through a third party biller. Accordingly, none of these alleged factual disputes creates a factual question regarding whether probable cause existed. Because no factual dispute existed, it was proper for the trial court to determine whether probable cause existed.

***2** Probable cause that a particular person has committed a crime "is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the accused is guilty of the offense...." *People v. Coutu,* 235 Mich.App 695, 708; 599 NW2d 556 (1999), quoting *People v. Tower,* 215 Mich.App 318, 320; 544 NW2d 752 (1996). There was no error in the trial court's conclusion that probable cause existed to arrest plaintiff Dr. Laney. From the perspective of a reasonably cautious person, the fact that plaintiff Dr. Laney was specifically implicated by Paul Smith and the fact defendant Blue Cross was billed for a service that was not rendered by plaintiff Dr. Laney seems to be sufficient evidence for purposes of probable cause to believe that plaintiff Dr. Laney was involved in a conspiracy with the Smith brothers and had submitted a fraudulent claim to defendant Blue Cross.

As discussed herein, defendants had probable cause to believe plaintiff had committed a crime and acted reasonably when submitting information to the prosecutor. The undisputed facts establish that plaintiff Dr. Laney's arrest was legal based on probable cause. Furthermore, there is no evidence on the record that defendants directed or persuaded anyone to arrest plaintiff Dr. Laney. To the contrary, the testimony of Prosecutor Kaiser, who issued the warrants, was that he decided to charge plaintiff Dr. Laney based on an oral recitation he received from FBI Agent Nina Burnett and a version of the facts of the case presented by Agent Burnett, Detective Byrne, and defendant Cedras. Prosecutor Kaiser testified that defendant Cedras never recommended that he charge anybody in the case, and defendant Cedras' only involvement was to answer questions. Plaintiff Dr. Laney has failed to provide specific facts supporting a conclusion that there was not probable cause for his arrest. Thus, there was no genuine issue of material fact regarding plaintiff Dr. Laney's claim of false imprisonment/false arrest. Furthermore, plaintiff Dr.

Laney's arrest was not illegal and summary disposition was appropriate. *Lewis, supra,* 415 Mich. 218.

Plaintiffs' second issue on appeal is that trial court erred in granting summary disposition and dismissing plaintiff Dr. Laney's claim of malicious prosecution because plaintiff Dr. Laney was subject to malicious prosecution and *Matthews, supra,* is not controlling authority. We disagree.

In a malicious prosecution action, the plaintiff has the difficult burden of proving four elements: "(1) that the defendant has initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice." *Matthews, supra,* 456 Mich. 365.

***3** *Matthews, supra,* provides guidance regarding whether plaintiff has stated a claim for malicious prosecution. In *Matthews, supra,* 456 Mich. 357-378, a dentist was charged, tried, and acquitted of charges of filing false health care claims and false pretenses with intent to defraud. After his acquittal, the dentist brought an action for malicious prosecution against the insurance company alleging that the agents of the insurance company provided inaccurate information to the prosecutor. *Id.* at 376. The *Matthews* Court noted that, in order for the dentist to sustain a prima facie case of malicious prosecution, against the insurance company, the dentist had to prove that the insurance company instituted or maintained the prosecution against him. *Id.* at 379. The *Matthews* Court concluded that the dentist failed to prove this element of malicious prosecution because the prosecutor, not the insurance company's agents, initiated, and maintained the prosecution against the dentist. *Id.* at 383-384. Specifically, the *Matthews* Court determined that the prosecution resulted from an investigation by a state detective and a warrant that was authorized by the prosecutor, in which the detective was the complainant. *Id.* Thus, the prosecutor, not the insurance company, had the independent authority to initiate the prosecution. *Id.* at 384.

As in *Matthews,* defendants did not initiate or maintain any prosecution against plaintiff Dr. Laney. Instead, the proceedings against plaintiff Dr. Laney were initiated by Prosecutor Kaiser based on the investigation conducted by FBI Agent Nina Burnett, defendants, and the Warren Police Department. The uncontested facts fail to demonstrate that defendants initiated a criminal proceeding against plaintiff Dr. Laney. Defendants merely provided information to Prosecutor Kaiser to support that there were potential wrongdoings by plaintiff Dr. Laney. It was Prosecutor Kaiser that had the authority and the discretion to initiate and maintain the prosecution against plaintiff Dr. Laney. Despite the fact that the warrant may not have been issued without the information provided by defendants the prosecution was initiated based on a independent exercise of prosecutorial discretion. *Matthews, supra,* 465 Mich. 386. The prosecutor's exercise of his independent discretion in initiating and maintaining a prosecution is generally a complete defense to an action for malicious prosecution. *Matthews, supra,* 465 Mich. 384. Thus, plaintiffs have not established a claim for malicious prosecution because they have not (and cannot) prove that defendants initiated, instituted, or maintained prosecution against plaintiff Dr. Laney.

Plaintiff also contends that dismissal of the criminal charges at the preliminary examination stage proved that probable cause was lacking. This claim is without merit. With regard to a malicious prosecution action against a private person, a prima facie case requires proof that the person instituted or maintained the prosecution, and "that the prosecutor acted on the basis of information submitted by the private person that did not constitute probable cause." *Id.* at 379. The element of probable cause refers to whether the defendant had probable cause to believe that the plaintiff had committed a crime. *Id.* However, probable cause does not depend on actual guilt and there may be probable cause to believe a person is guilty of a crime when he was actually innocent. Thus, the fact that the criminal proceedings were ultimately terminated in the plaintiff's favor does not mean that probable cause for initiating the proceedings was lacking. *Drobczyk v. Great Lakes Steel Corp,* 367 Mich. 318, 322-323; 116 NW2d 736 (1962). There was no evidence introduced establishing that defendants initiated or maintained the prosecution, or that the prosecutor acted solely on the basis of information supplied by defendants. As we held, *supra,* there was probable cause for the prosecution

of plaintiff Dr. Laney. It was reasonable to conclude that plaintiff Dr. Laney had engaged in a conspiracy and filed a false claim based on the investigation by defendant Cedras and the FBI. Accordingly, a prima facie case of malicious prosecution was not presented.

***4** Furthermore, plaintiff Dr. Laney's affidavit did not constitute sufficient independent evidence of a factual dispute on the requisite elements of his malicious prosecution claim. *Matthews, supra,* 456 Mich. 377-378. "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v. Rozwood,* 461 Mich. 109, 121; 597 NW2d 817 (1999). Plaintiff Dr. Laney did assert that defendants withheld exculpatory evidence from the prosecution, namely, that plaintiff Dr. Laney used a third party biller in submitting the false claim. "Failure to include all exculpatory facts is not adequate to sustain a suit for malicious prosecution." *Payton v. Detroit,* 211 Mich.App 375, 395; 536 NW2d 233 (1995). What is required is evidence that would give rise to the inference that the defendant knowingly included false facts in his affidavit, without which the prosecutor could not have concluded there was probable cause. *Matthews, supra,* 456 Mich. 390; *Payton, supra,* 211 Mich.App 395. Plaintiff has not presented any evidence that defendants believed the information that was turned over to the prosecution was false, and there was no evidence that defendants initiated or maintained a criminal prosecution against plaintiff. There was absolutely no evidence of malice presented beyond plaintiff Dr. Laney's contention that defendant Cedras was possibly seeking a promotion. Plaintiffs' assertion that defendants failed to include all exculpatory facts is not adequate to sustain a suit for malicious prosecution. *Payton, supra,* 211 Mich.App 395. Plaintiffs offered no evidence that would give rise to the inference that defendants knowingly included false facts involving information without which the prosecutor could not have concluded there was probable cause.

There was no evidence to indicate that defendant Blue Cross (or any of its employees), initiated the prosecution. Additionally, as we held, *supra,* the record reveals that there was probable cause to prosecute plaintiff Dr. Laney. Furthermore, the *Matthews* case, decided by the Michigan Supreme Court, is dispositive of this malicious prosecution claim. *Matthews, supra.* Consequently, the trial court properly granted summary disposition on the malicious prosecution claim. *Matthews, supra,* 456 Mich. 378; *Cox v. Williams,* 233 Mich.App 388, 391; 593 NW2d 173 (1999).

Plaintiffs' final issue on appeal is that the trial court erred when it dismissed the balance of plaintiffs' claims without addressing the merits of each claim, which included defamation/slander, retaliation, interference with a contractual relationship, negligent misrepresentation, intentional infliction of emotional distress, and loss of consortium. We disagree.

Plaintiffs argue on appeal that summary disposition was not proper on the defamation/slander claim, and that the court failed to address the claim. A communication is defamatory if, under all of the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or it deters others from associating or dealing with the individual. *Kefgen v. Davidson,* 241 Mich.App 611, 617; 617 NW2d 351 (2000). In order to establish a claim of defamation, a plaintiff must show: (1) a false or defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm for defamation per se, or the existence of special harm caused by publication for defamation per quod. *Kefgen, supra,* 241 Mich.App 617. At common law, words charging the commission of a crime are considered defamatory per se and the injury to the defamed person's reputation is presumed. *Burden v. Elias Big Boy Restaurants,* 240 Mich.App 723, 727-728, 613 NW2d 378 (2000).

***5** Several of the alleged defamatory statements were made during the course of judicial proceedings. "Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried." *Maiden, supra,* 461 Mich. 133-134. Falsity or malice on the part of the witness does not abrogate the privilege. *Maiden, supra,* 461 Mich. 134. This immunity extends to every step in the proceeding and covers anything that may be said in relation to the matter at issue including pleadings and affidavits. *Couch v. Schultz,* 193 Mich.App 292, 295; 483 NW2d 684 (1992). Thus, the

statements made in the course of the proceedings in the courtroom, as well as statements made in connection with executing the warrant, are absolutely privileged.

Plaintiffs, in their brief on appeal, admit that statements made during courtroom proceedings are entitled to immunity, but argue that statements were made in the hallways of the courthouse with third parties in earshot, that were not privileged. Plaintiff Dr. Laney testified that third parties heard these statements in the hallway, but could not give any particular names of individuals who heard these comments. The defamation "elements must be specifically pleaded, including the allegations with respect to the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the alleged defamatory words." *Gonyea v Motor Parts Federal Credit Union,* 192 Mich.App 74, 77; 480 NW2d 297 (1991). This Court has noted that allegations made regarding defamatory statements, which do not state to whom publication was made and do not state the substance of the defamatory statement are deficient. *Gonyea, supra,* 192 Mich.App 77-78. However, this Court has recognized that "because a slanderous statement cannot be retained verbatim in many instances since it is spoken, ... it is sufficient if the complaint sets out the substance of the alleged slander and it is not necessary to recite the exact words used." *Pursell v. Wolverine-Petronix, Inc,* 44 Mich.App 416, 422; 205 NW2d 504 (1973). There were no specific allegations as to what was said in the hallways of the courthouse or as to who heard these statements. This exception to the rule does not alleviate the requirement of alleging to whom the publication was made and at least alleging the substance of the statement.

Any of the alleged defamatory statements that were made during the course of the judicial proceedings, including in court statements and statements made in the execution of the warrant, are protected by an absolute privilege. Therefore, any slander/defamation claim regarding any of these statements was properly summarily dismissed. With regard to the allegation that statements were made outside the courtroom, the allegations lacks the specificity of to whom the statements were published and what the statements were, thus, making the allegation deficient. Plaintiffs have failed to set forth any evidence showing that there is a genuine issue for trial regarding the slander/defamation claim. Therefore, the trial court did not err in granting summary disposition with respect to plaintiff's claim of slander/defamation.

***6** Plaintiffs next alleges that defendant Cedras interfered with plaintiff Dr. Laney's participation program agreement with defendant Blue Cross and caused him to be placed on Prepayment Utilization Review (PPUR). The elements of tortious interference with contractual relations are "(1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by defendant." *Mahrle v. Danke,* 216 Mich.App 343, 350; 549 NW2d 56 (1996). The arguments on appeal tend to focus on the second and third elements.

Defendants contend that there was no breach of the participation agreement, which is an element of tortious interference with a contractual relationship. It does not appear that there was a breach of contract in placing plaintiff Dr. Laney on PPUR, but plaintiffs allege that the contract was breached because plaintiff Dr. Laney submitted fifty claims that were not paid, which raises a question of breach. Regardless of whether there was a breach of contract, plaintiffs have not demonstrated that there was an unjustified instigation of breach by defendant Cedras.

This Court stated, in regard to the third element, that one who alleges tortious interference with a contractual relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice that is unjustified in law for the purpose of invading the contractual rights of another. *Woods v Herndon & Herndon Investigations, Inc,* 186 Mich.App 495, 500; 465 NW2d 5 (1990). A person is not liable for tortious interference with a contract if legitimate personal or business interests motivate him or her. *Wood, supra,* 186 Mich.App 500. The defendant's motivation is one of several factors to be weighed in assessing the propriety of the defendant's actions along with the following other factors: (1) the nature of the defendant's conduct; (2) the nature of the plaintiff's contractual interest; (3) the social utility of the parties' respective interests; and (4) the proximity of the defendant's conduct with the interference. *Id.*

Even if there was a breach of contract, plaintiffs are unable to demonstrate that there was an unjustified instigation of the breach by defendant Cedras. Defendant Cedras requested that plaintiff Dr. Laney

be placed on PPUR status. Pursuant to our analysis, *supra,* there was probable cause to issue an arrest warrant for plaintiff Dr. Laney. There was evidence that plaintiff Dr. Laney could potentially have been involved in a health care fraud conspiracy and there was evidence that he submitted a bill for a service he did not render. Plaintiff Dr. Laney, apparently, argues that defendant Cedras was trying to further his own interest in hopes of getting a promotion, which provided a motive to instigate a breach of contract between defendant Blue Cross and plaintiff Dr. Laney. Plaintiff Dr. Laney has provided no support for this broad conclusion. There is no evidence that defendant Cedras would gain anything by causing defendant Blue Cross to breach a contractual agreement with plaintiff Dr. Laney. The information derived from the investigation of plaintiff Dr. Laney, and the fact that a claim was filed for services that were not rendered by plaintiff Dr. Laney is evidence that placing plaintiff Dr. Laney on PPUR status was a legitimate business interest of defendant Blue Cross. Accordingly, plaintiff's claim for tortious interference with contractual relations was properly dismissed for there is no genuine issue of material fact.

*7 Plaintiff Dr. Laney further alleges that defendant Blue Cross' conduct amounted to an intentional infliction of emotional distress. [FN2] In order to establish a valid claim of intentional infliction of emotional distress, a plaintiff must show: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Graham v. Ford,* 237 Mich.App 670, 674; 604 NW2d 713 (1999). The *Graham* Court further stated:

> FN2. Note that the Michigan Supreme Court has never specifically recognized or adopted the tort of intentional infliction of emotional distress. *Smith v. Calvary Christian Church,* 462 Mich. 679, 686 n 7; 614 NW2d 590 (2000). However, panels of this Court have recognized claims of intentional infliction of emotional distress. *Clarke, supra,* 197 Mich.App 548.

> Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Doe v. Mills,* 212 Mich.App 73, 91; 536 NW2d 824 (1995). Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Id.* It is not enough that the defendant has acted with an intent that is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort. *Roberts v. Auto-Owners Ins Co,* 422 Mich. 594, 602-603; 374 NW2d 905 (1985), quoting Restatement of Torts, 2d, § 46, comment d, pp 72-73. In reviewing a claim of intentional infliction of emotional distress, we must determine whether the defendant's conduct is sufficiently unreasonable as to be regarded as extreme and outrageous. *Doe, supra* [, 212 Mich.App 92]. The test is whether "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to claim, 'Outrageous!" ' *Roberts, supra* [, 422 Mich] 603. [*Graham, supra,* 237 Mich.App 674-675.]

Plaintiffs argue that defendants' conduct was extreme and outrageous in that criminal proceedings were initiated against plaintiff Dr. Laney and because there was an unwarranted compilation of evidence against plaintiff Dr. Laney. Plaintiffs further argued that this unwarranted compilation of evidence presented a question of fact. Initially, as a matter of law, the court must determine if a defendant's conduct could be reasonably regarded as extreme and outrageous. *Teadt v Lutheran Church Missouri Synod,* 237 Mich.App 567, 582; 603 NW2d 816 (1999). If reasonable minds could differ, then a jury must determine if the conduct was extreme according to the particular facts of the case. *Teadt, supra,* 237 Mich.App 582.

This Court has rejected a plaintiffs' claim for intentional infliction of emotional distress where the defendant's employee merely filed a complaint with police against the plaintiffs. *Hall, supra,* 153 Mich.App 616-617. In *Hall, supra,* the panel found no evidence of intent to cause the plaintiffs to suffer the requisite emotional distress where the defendant's employee did no more than file a complaint with law enforcement officials. *Id.* at 617. Moreover, in a plurality decision of the

Michigan Supreme Court, Justice Levin stated, "the mistake in identifying [plaintiff] Adams as the culprit was [not] 'outrageous' ..." enough to maintain an intentional infliction of emotional distress action. *Adams v. National Bank of Detroit,* 444 Mich. 329, 333 n 4; 508 NW2d 464 (1993) (plurality opinion). [FN3]

FN3. We note that "a plurality decision in which no majority of the participating justices agree concerning the reasoning is not binding authority under the doctrine of stare decisis." *Burns, supra,* 212 Mich.App 582.

***8** After viewing the claim in a light most favorable to plaintiffs, we do not believe that a trier of fact could conclude that defendant Blue Cross' conduct rose to an extreme or "outrageous" level. The trial court properly granted defendants' motion for summary disposition with regard to plaintiffs' claim for intentional infliction of emotional distress. Plaintiff makes nothing more than unsubstantiated allegations that there was an unwarranted compilation of evidence, and that, in light the dismissal of charges and minimal evidence, this is considered outrageous conduct. As we held, *supra,* there was probable cause to suspect plaintiff Dr. Laney of criminal activity, and thus, defendant Blue Cross' actions in conducting an investigation were not extreme or outrageous. Furthermore, plaintiffs offered no evidence which shows that, in effectuating its investigation, it was defendant Blue Cross' intent to cause plaintiff Dr. Laney the requisite emotional distress. Accordingly, the trial court properly granted summary disposition in favor of defendants in regard to plaintiffs' claim for intentional infliction of emotional distress.

Plaintiffs argue that the trial court erred in dismissing their retaliation, negligent misrepresentation, and loss of consortium claims. However, plaintiffs cite no case law or other authority for this argument. Therefore, the issues are abandoned. *Magee v. Magee,* 218 Mich.App 158, 161; 553 NW2d 363 (1996). "A party may not leave it to this Court to search for authority to sustain or reject its position." *Magee, supra,* 218 Mich.App 161. A party may not merely announce its position and leave it to this Court to discover and rationalize the basis for the claim. *Goolsby v. Detroit,* 419 Mich. 651, 655 n 1; 358 NW2d 856 (1984); see also *Manning v. City of East Tawas,* 234 Mich.App 244, 247 n 2; 593 NW2d 692 (1999), citing *Goolsby, supra.* Accordingly, the issue of whether the retaliation, negligent misrepresentations, and loss of consortium [FN4] claims should be dismissed is abandoned.

FN4. Additionally, in *Long v. Chelsea Community Hosp,* 219 Mich.App 578, 589; 557 NW2d 157 (1996), this Court held that a "derivative claim for loss of consortium stands or falls with the primary claims in the complaint. Because plaintiffs' other claims failed, the loss of consortium claim must likewise fail." *Long, supra,* 219 Mich.App 589. In the instant case, plaintiff Kim Laney's claim for loss of consortium must fail in all respects.

The trial court properly granted summary disposition in favor of defendants on plaintiffs' claims for defamation/slander, interference with a contractual relationship, and intentional infliction of emotional distress. Plaintiffs' claims of retaliation, negligent misrepresentation, and loss of consortium have been abandoned.

Affirmed.

2003 WL 1343284 (Mich.App.)

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